MIGRATION - Refugees - application for refugee status in Australia - applicant previously granted refugee status in Germany - whether Article 1E of the Convention Relating to the Status of Refugees required the allegation of fear of persecution to be tested by reference to the conditions in Germany or by reference to conditions in the State of Nationality - whether the rights of the applicant were the rights of a German National - whether proof of attitude of German competent authorities relevant.

Convention Relating to the Status of Refugees; Art 1E.

Vienna Convention on the Law of Treaties; Arts 31, 32.

Migration Act 1958 (Cth); ss476, 478, 485.

Federal Court Rules; O54B r2.

Nagalingam v Minister for Immigration, Local Government and Ethnic Affairs (1992) 38 FCR 191; discussed and applied.

Minister for Foreign Affairs and Trade v Magno (1992) 112 ALR 529; referred to

Chan Yee Kin v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379; referred to.

Polish Refugee Compensation Case (1987) 72 ILR 647; applied.

Hurt v Minister of Manpower and Immigration (1978) 21 NR 525; referred to.

REZA BARZIDEH v MINISTER FOR IMMIGRATION AND ETHNIC AFFAIRS

No. WG54 of 1995

HILL J

SYDNEY (Heard in Perth)

21 AUGUST 1996

IN THE FEDERAL COURT OF AUSTRALIA)

)

WESTERN AUSTRALIA DISTRICT REGISTRY) No WG 54 of 1995

)

GENERAL DIVISION)

BETWEEN: REZA BARZIDEH

Applicant

AND: MINISTER FOR IMMIGRATION AND ETHNIC AFFAIRS

Respondent

CORAM: HILL J

PLACE: SYDNEY (Heard in Perth)

DATED: 21 AUGUST 1996

MINUTES OF ORDER

THE COURT ORDERS THAT:

1. The application be stood over to any date in December.

2. Each party has liberty to apply upon seven days' notice.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA)

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DATED: 21 AUGUST 1996

REASONS FOR JUDGMENT

Mr Barzideh (*"the applicant"*) is a citizen of Iran who arrived in Australia in February 1994 and was granted a visitor's entry permit valid for one month. He had been living in Germany since 1986 and had been granted refugee status by that country in May 1991.

On 1 March 1994 he applied to the Department of Immigration and Ethnic Affairs to be recognised as a refugee in this country. This application was treated as an application for a protection (permanent) entry permit. It was refused and the applicant applied to the Refugee Review Tribunal (*"the Tribunal"*) for a review of that decision.

The Tribunal affirmed the decision of the delegate of the Minister that the applicant was not entitled to a protection visa. It concluded on the material before it that the statutory criterion for the issue of a visa of that kind was not satisfied because the applicant was not a person in respect of whom Australia had protection obligations under the Convention Relating to the Status of Refugees (*"the Convention"*) as amended by the 1967 Protocol Relating to the Status of Refugees (*"the Protocol"*).

The initial question facing the Tribunal was whether to consider the applicant's qualification for refugee status by reference to his country of nationality (Iran), or by reference to the country in which he had been granted refugee status and in which he had resided for some time (Germany). In determining this question the Tribunal was called upon to consider Article 1E of the Convention which provides:

"This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country."

The Tribunal found that the applicant did in Germany have the rights and obligations attached to the possession of German nationality.

The Tribunal then proceeded to determine whether, within the Convention definition, the applicant had a well-founded fear of persecution in Germany on one or other of the Convention grounds. It is sufficient here to note that the applicant had been the subject of racist taunts and had been assaulted by some neo-Nazi youths in April 1993. He referred in support of his case to the fact that a building neighbouring upon that in which he lived had been burnt down. No harassment was claimed to have occurred to him after mid-1993, this being the time when, according to material before the Tribunal, some stronger steps to curb neo-Nazi violence had been undertaken by the German Government.

The Tribunal, on the material before it, formed the view that it was not satisfied that the applicant had a well-founded fear of persecution in Germany. It was accordingly of the view that the applicant could not satisfy the requirement of showing that he was a person to whom Australia owed treaty obligations and thus affirmed the decision that he was not entitled to a protection visa. From this decision the applicant purported to appeal to this Court.

A jurisdictional question was advanced as a threshold issue, that jurisdictional question being raised for the first time the evening before the date of the hearing in the written submissions that were filed on behalf of the respondent. This was so notwithstanding the requirement in the Court's rules that any jurisdictional question be notified by a respondent to an applicant within 14 days of being served with the application (*Federal Court Rules* Order 54B r3 *"Notice of objection to competency"*). While the requirement in the Court's Rules that a jurisdictional challenge must be notified can not confer upon the Court jurisdiction where it does not have that jurisdiction, it is clear that, should it turn out to be the case that the Court has no jurisdiction, the Minister should be in the least deprived of costs up to and including the date of the initial hearing before me.

The jurisdictional question arises in the following way. Section 476 of the *Migration Act* 1958 (Cth) (*"the Migration Act"*) permits applications for review to be entertained by the Court of what is referred to in the legislation as *"a judicially-reviewable decision"*. The present is such a decision. The grounds of review are limited and review on other grounds is precluded. Section 478 then provides:

"(1) An application under section 476 or 477 must:

*(a) be made in such manner as is specified in the Rules of Court made under the **Federal Court of Australia Act 1976**; and*

(b) be lodged with a Registry of the Federal Court within 28 days of the applicant being notified of the decision.

(2) The Federal Court must not make an order allowing, or which has the effect of allowing, an applicant to lodge an application outside the period specified in paragraph (1)(b)."

Section 485 of the Migration Act then provides:

*"(1) In spite of any other law, including section 39B of the **Judiciary Act 1903**, the Federal Court does not have any jurisdiction in respect of judicially-reviewable decisions or decisions covered by subsection 475(2), other than the jurisdiction provided by this Part or by section 44 of the **Judiciary Act 1903**.*

*(2) Subsection (1) does not affect the jurisdiction of the Federal Court in relation to appeals under section 44 of the **Administrative Appeals Tribunal Act 1975**.*

*(3) If a matter relating to a judicially-reviewable decision is remitted to the Federal Court under section 44 of the **Judiciary Act 1903**, the Federal Court does not have any powers in relation to that matter other than the powers it would have had if the matter had been as a result of an application made under this Part."*

The effect of these provisions has been held to be that unless an application for review is made in a timely way in accordance with s478, the Court has no

jurisdiction to hear it and, in particular, jurisdiction under either s39B of the *Judiciary Act* 1903 (Cth) or s8 of the *Administrative Decisions (Judicial Review) Act* 1976 (Cth) (*"the ADJR Act"*) is excluded, notwithstanding that an accrued right otherwise might have existed to such a review: *Faud Bin Mahboob v Minister for Immigration and Ethnic Affairs* (unreported, Lehane J, 15 March 1996) and *Chen v Minister for Immigration and Ethnic Affairs* (unreported, Tamberlin J, 19 April 1966).

More recently in another case the question has been referred to a Full Court for decision and it is understood that a Full Court is being convened to deal with the question as a matter of urgency. It was in this context that I indicated to the parties in the present case that I would deal with the merits of the applicant's case and if I was of the view that no question of law arose or that no basis for review existed, I would discuss the application without the necessity to decide the jurisdictional issue. If on the other hand I was of the view that on administrative law grounds the applicant should succeed, I indicated that I would not enter final judgment but would merely stand the matter over pending the determination by the Full Court of the matter that has been referred to it. Both parties expressed agreement to this course.

I should say, however, that in the present case there is a complication which does not really arise in the matter before the Full Court. It is this. The present is not a case where the applicant did nothing within the twenty-eight days provided by the Rules for the lodgement of applications to review decisions of the Tribunal. Within that time the applicant lodged what was expressed to be a *"notice of appeal"* against the Tribunal's decision. The notice was not, at least precisely, in the form provided in the Rules for applications for review. Order 54B of the Rules provides relevantly as follows:

"2 (1) An application to review a judicially-reviewable decision under the ***Migration Act 1958*** *must be in accordance with Form 56.*

(2) An application to review a judicially-reviewable decision under the ***Migration Act 1958*** *must indicate the date that the applicant was notified of the judicially-reviewable decision."*

Form 56 contains a heading *"Application for an Order of Review"*. It requires the applicant to identify the reasons why the applicant is aggrieved and the grounds of the application.

The document lodged within time notified the respondent of an appeal from the decision of the Tribunal and identified the decision. It then continued:

"2. THE QUESTIONS OF LAW raised on the appeal, and

3. ORDERS SOUGHT, and

4. GROUNDS, will be specified as soon as legal advice is given. The reason for this application to be incomplete is due to the fact that it has been difficult to access proper legal advice and also to the fact that Monday will be the last day to lodge this application, (since the 28 days given to apply)."

The form then continued in the usual way provided in the Rules for applications, or for that matter provided in Form 56.

Subsequently an amended application was filed. It continued to be in the form of a notice of appeal, but ultimately identified questions of law and grounds.

It may be noted that the Court's Rules permit non-compliance with the Rules to be waived (see Order 1 r8), but there would be a difficulties in the way of that course here. The first is that by Statute the application for review must be in accordance with the Rules inferentially as they existed at the date of the application. Secondly, the Migration Act prohibits the Court making any order which has the effect of allowing an applicant to lodge an application outside the twenty-eight day period provided in the Rules.

Two questions thus arise in the present case. The first is whether the notice of appeal as lodged can be said to be substantially in the form of Form 56 so that the jurisdictional issue does not arise. The second, which only arises if that question is answered adversely to the applicant, is whether the filing now of an amended application in fact complying with Order 56 would be prohibited by s478(2) of the Migration Act.

In accordance with the agreement of the parties, I have not decided those two issues as they may become moot following upon the Full Court's decision. Should it turn out that the applicant is precluded from applying to this Court on these technical grounds, then the only course left to the applicant would seem to be to apply to the High Court in its original jurisdiction, as the jurisdiction of that Court has not been excluded, nor could it constitutionally be.

I proceed then to the merits of the appeal.

The applicant appeared before me in person, although with the assistance of an interpreter. He sought to tender, via an affidavit, material which he said supported his case from Amnesty International published after the date the Tribunal's decision

was given. I indicated then that the material was inadmissible. It can obviously not be an error of law that the Tribunal failed to take this material into account because the material was not in existence at the time of the Tribunal's decision. It is difficult to see on what basis it could be relevant in the review of the Tribunal's decision, whether that review were to arise under the Migration Act or under the ADJR Act.

This material having been rejected, there could be distilled from written submissions three complaints made by the applicant. In stating them I hope I do justice to the submissions, expressed as they were in layman's terms. First it was said that, in determining that Germany was the relevant point of reference for deciding whether the applicant was entitled to refugee status, the Tribunal applied the wrong test. It was submitted that if the correct test had been applied, the focus would have shifted to Iran. Related to this submission is the suggested failure on the part of the Tribunal to take into account the fact that the applicant's travel documents expired in June 1996. Secondly, it was submitted that the Tribunal gave insufficient weight to the materials and submissions of the applicant to the effect that he had a well-founded fear of persecution. Finally, it was submitted that the applicant was denied natural justice because he was not legally represented before the Tribunal. The last two submissions may be dealt with shortly.

It was not submitted that, and indeed the applicant expressly disavowed reliance upon such a submission, there was no evidence upon which the Tribunal was entitled to base its decision as to the applicant's lack of a well-founded fear of persecution. What was suggested was that the Tribunal, if it had given more weight to the applicant's submissions and materials, should have come to the opposite (and according to the applicant the right) conclusion.

Not unsurprisingly, the applicant, as a layman, was unaware of the limits of judicial review and the distinction between judicial review on the one hand and merits review on the other. Findings of fact are for the Tribunal and not for the Court. So long as there was some evidence upon which the Tribunal could base its findings, those findings can not be set aside by the Court. Questions of the weight which the Tribunal might give to one lot of evidence as against another, are likewise questions for the Tribunal. No reviewable error is shown if the Tribunal gives greater weight to one lot of evidence rather than to another.

Nor is there any reviewable error by the Tribunal proceeding with its review, notwithstanding the fact that the applicant was unrepresented before it. First it must be said that the applicant did not ask the Tribunal to defer hearing the review pending his being given legal representation. Nor for that matter was the lack of representation ever mentioned by the applicant before the Tribunal. Indeed, the applicant chose to proceed before the Tribunal, an administrative tribunal not a court, without representation. That of itself might not necessarily be determinative.

However, it is clear from the decision of the High Court in *New South Wales v Canellis* (1994) 181 CLR 309 at 331, that the rules of natural justice do not require the provision of legal representation in administrative inquiries. The High Court in that case clearly rejected the extension of the principle in *Dietrich v The Queen* (1992) 177 CLR 292, namely that there was, in serious criminal trials at least, a right to legal representation. No such right exists, so the High Court held, in administrative proceedings.

So, if the applicant is to succeed it will be because the Tribunal has misconstrued Article 1E of the Convention.

Before considering the language of the Convention, cases and other materials relevant to its construction, it is convenient to set out the approach taken by the Tribunal.

The approach adopted by the Tribunal to the construction of Article 1E was that the Article would operate to exclude an applicant from refugee status where an applicant had **most, but not all,** of the rights normally enjoyed by nationals. The Tribunal said:

*"Those accorded refugee status in Germany have rights **largely equivalent** to German nationals, although they are precluded from voting (although they have the right to freedom of political opinion and may join political parties and movements) and from entering some areas of public employment, while the obligation to serve in the armed forces is reserved to German citizens only. The Applicant has the right to become a citizen in the future and thus exercise full political rights. Moreover, as the holder of a German Travel document and permanent resident permit, the Applicant has the right of entry to Germany and is fully protected against removal or expulsion (**refoulement**)."* [Emphasis added]

In another passage the Tribunal refers to the *"rights and obligations"* in the second country as being not merely nominal but extending to *"fundamental rights, such as adequate State protection from violence."*

In taking the view it did, the Tribunal purported to be acting in accordance with a decision of this Court in *Nagalingam v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 38 FCR 191 per Olney J, and a prior Tribunal decision, *RRT Decision V93/01133* (27 March 1995). As the Tribunal indicated that it agreed with and adopted the reasonings and findings of that decision, it will be necessary to consider that decision, in addition to the decision in *Nagalingam*, to which I turn next.

The applicant in *Nagalingam* was a national of Sri Lanka. The intermediate country in which he had been accepted as a refugee was Norway. The applicant

later applied for refugee status in Australia and when his application was rejected on the grounds of Article 1E, sought judicial review of the decision. A basis of the rejection was the mere existence of refugee status in Norway. But as Olney J observed (at 198), the correct question to determine was not whether the applicant had been granted refugee status in Norway, but rather whether there had been conferred upon him the **same** rights and whether there had been imposed upon him the **same** obligations as were attached to the position of nationality.

In *Nagalingam* the only matter relied upon by the decision-maker as having the relevant consequence was the grant by Norway of refugee status. There was no evidence before the decision-maker to indicate whether, in accordance with Norwegian domestic law, the mere granting of refugee status conferred rights and imposed obligations so that Article 1E was made applicable. Accordingly, the matter was remitted to the decision-maker to determine the matters which Article 1E required to be determined.

In the course of his judgment Olney J said (at 200):

"There is no question that par E applies in cases where the person concerned possesses something less than nationality. If this were not so, par E would have no purpose in view of the provisions of par c(3). But the fact that the applicant may enjoy in Norway the protection of the state from persecution in his own country is a normal consequence of being granted refugee status and says nothing about whether his rights and obligations in Norway ***equate*** *those of a Norwegian national."* [Emphasis added]

His Honour suggested that the Norwegian authorities should be asked whether the applicant was recognised as having the rights and obligations which are attached to the possession of Norwegian nationality. His Honour continued (at 201):

"If the question had been asked, the answer would have been decisive of the issue of whether or not the applicant was excluded from the definition of refugee by operation of par E."

Strictly, the only matter decided in *Nagalingam* was that the reference in Article 1E to rights is not merely a reference to the rights provided by the Convention to refugees. Rather the rights in question go beyond those of mere refugee status. No doubt, the Tribunal did not make the mistake that had been made by the Tribunal in *Nagalingam* and so, in one sense, it may be said that the Tribunal in concluding as it did followed the decision of Olney J. But there were two matters, certainly *dicta* but none the less significant *dicta*, which the Tribunal did not follow because of the view that it should follow the earlier Tribunal decision with which it agreed. Presumably it did not agree with the *dicta* of Olney J. The two matters were: first that the German authorities should be asked and that there reply would be determinative; the second

was that the proper test to apply was not whether some of the rights of the applicant were the same as those of a national, but rather whether the rights equated with those of a national.

The earlier Tribunal decision had likewise referred to the judgment of Olney J but had then gone on to say of the judgment that it:

".. did not go on to define just what rights a person must have in order to fall within Article 1E."

That comment is, of course, true but only because Olney J appears to have been of the view that for Article 1E to apply, all of the rights and obligations of the refugee must equate to those of a nation, rather than that some only of the rights and obligations will be the same.

It is interesting to note that in the reasons of an earlier Tribunal decision (BV93/00047) it is indicated that the Tribunal had addressed the following question, *inter alia*, to the German Consulate-General in Melbourne:

"Is a person who has been granted refugee status in terms of Art 1E of the 1951 Convention relating to the Status of Refugees recognised by the competent authorities in Germany as having the rights and obligations which are attached to the possession of German nationality?"

That question elicited the following answer:

"A person who has been granted refugee status in Germany in terms of the 1951 Convention relating to the Status of Refugees is not recognised as having the rights and obligations of a German citizen."

If, as Olney J thought, the answer from Germany was determinative, one might have thought that that would have been the end of the matter. However, the Tribunal determined that the relevant question was not what the German authorities understood but rather:

"What rights and obligations must the applicant have to fall within the provisions of Article 1E?

What rights and obligations do German nationals possess, and what rights and obligations does the applicant possess?"

The Tribunal, in the earlier decision, considered textbooks and other literature concerning the Convention, and it will be necessary to review that material here. Although the Convention has relevantly been made part of Australian domestic law through the *Migration Act*, the construction of the treaty should not be approached as if part of Australian legislation. As Gummow J said in *Minister for Foreign Affairs and Trade v Magno* (1992) 112 ALR 529 at 535-6:

"...(i) it is to be remembered that the terms used are not those drafted by parliamentary counsel, but are the result of negotiations between a number of contracting State parties with various legal systems and methods of legislative drafting; (ii) if the text or one of the texts is not in English, a question may arise as to the extent to which the municipal court takes judicial notice of the foreign language which has been used for what is now part of the municipal law; and (iii) the applicable rules of interpretation are those recognised by customary international law, as codified by the Vienna Convention on the Law of Treaties ..." .

Technical rules or legal precedent prevailing in the common law world may be put to one side in favour of what Lord Wilberforce in *James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd* [1978] AC 141 at 152 referred to as *"broad principles of general acceptation"*. Paragraphs 1 and 2 of Article 31 of the Vienna Convention on the Law of Treaties direct that the interpretation of treaties should be in accordance with the ordinary meaning to be given to the terms of the treaty and their context and in the light of the object and purpose of the treaty. Article 32 of the same treaty permits recourse to be had to supplementary materials including the preparatory work of the treaty (*les travaux préparatoires*) and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of the basic principle of interpretation or to determine the meaning when there is ambiguity or the result would otherwise be manifestly absurd or unreasonable.

If I approach the task as one seeking to find the ordinary meaning of the words in the language used, there seems little scope for argument. Article 1E will apply only where the claimant has (or is accepted by the competent authorities as having) the same rights and obligations as a national but is not in fact a national. The ordinary meaning of the words does not suggest that Article 1E will apply where the claimant has some of the rights and is subject to some only of the obligations of nationals, but does not have other of the rights and is not subject to other of the obligations of nationals.

Having reached a view as to the ordinary meaning of the words of the treaty, it is then necessary to turn to the *travaux préparatoires* to ascertain whether that meaning is confirmed. Likewise, to the extent that it is suggested that the meaning obtained from a consideration of the language of the Convention is absurd or irrational, that issue too may be elucidated by regard to the *travaux préparatoires*.

As originally drafted, Article 1E referred only to refugees of German extraction (*"Volksdeutsche"*) residing in Western Germany. Article 116 of the German Grundgesetz provides:

"Unless otherwise provided by law, a German within the meaning of this basic law is a person who possesses German citizenship or who has been admitted to the territory of the German Reich within the frontiers of 31 December 1937 as a refugee or expellee of German stock (Volkszugehörigkeit) or as the spouse or descendant of such person."

The exclusion of such persons was proposed, both on the grounds that they had no need for assistance as refugees since their needs were being met by West Germany, as well as on the basis that Germany was morally responsible for its own migrants. The Israeli delegate apparently saw exclusion also as a matter of retribution: cf Hathaway, *The Law of Refugee Status*, Butterworths, 1991 ed, at 211, note 133 (*"Hathaway"*).

It seems that for political reasons it was though undesirable to refer directly to West Germany and the present wording was introduced in the General Assembly. Hathaway, at 212 note 735, quotes from a statement of the French delegate, noting that the exclusion clause:

"... would still its purpose if ... [one were to avoid] *reference by name to a Government with which, incidentally, a number of states entertain diplomatic relations."*

Once the Article was drafted in general terms there was considerable debate about it. Nevertheless, Mrs Roosevelt, the delegate of the United States, as well as delegates from Mexico and the United Kingdom, continued to state (see Hathaway at 212) that the revised proposal was intended only to exclude from refugee status:

"persons involved in mass movements of population due to frontier changes, who possessed the same rights as the inhabitants of the country in which they were currently living."

The final language of the clause, as moved by the representative of New Zealand, acknowledged, so Hathaway

reports (at 212), a concern regarding *"genuine equivalency of rights and obligations"*.

The meeting of plenipotentiaries subsequently held in July 1951 left no doubt as to the purpose or scope of the Article. Thus the United States delegate is reported in A/CONF. 2/SR.23 at 26 as having

"... recalled the fact that paragraph D had been adopted by the General Assembly as the result of the deletion of the words `in Europe' from sub-paragraph A (2) of article 1. The intention was to take care of ***de facto*** *citizenship. It had been thought that a grant of citizenship might take place in certain circumstances, and that, while that status was being legally confirmed, the refugees in question should to all intents and purposes have the rights and obligations of nationals."*

At that same meeting the Netherlands delegate sought, but did not receive, clarification concerning the words *"rights and obligations which are attached to the possession of the nationality of that country"*. The report of the proceedings (at 25-6) notes the assumption of that delegate:

"... that those did not donote [sic] *political rights and obligations, such as the right to vote, the right to occupy certain public positions or the obligation to do military service, but only economic and social rights."*

To the extent that Robinson in his work *Convention Relating to the Status of Refugees*, New York, 1953 (*"Robinson"*), suggests (at 65) that it was the conference's view that equality with nationals in the sphere of economic and social rights was sufficient, quoting the page of the United Nations report dealing with the comment of the Netherland's representative, Robinson is incorrect.

At the expiration of the debate the French representative sought agreement that the text be referred to a working party upon which the German representative should serve. This, he said, was because the purpose of the text was to deal with the situation which existed in Germany.

The material which I have cited supports the general construction which I have suggested should be given to the Article. The primary purpose of the Article was clearly to deal with the situation of the *Volkesdeutsche* who had, in German law, the same status as German nationals. Although clearly the amendment of the Article displayed an intention to widen the scope of the Article so that it could comprehend persons other than *Volkesdeutsche* living in West Germany, the intention was not to widen the class of persons excluded from refugee status beyond those who had *de facto* nationality. Therefore, the clause should be construed so that the rights and obligations with which it was concerned had to include all

of the rights and obligations of a national, rather than but some of them.

The proper test to apply, in my view, confirmed by a reference to the preparatory works, is to ask the question whether, either by force of a general law or by force of a recognition given by the relevant competent authorities on an individual basis, the person seeking to be classified as a refugee enjoys the same rights and comes under the same obligations as does a person who is a national without actually being a national of the territory.

References to secondary sources, such as textbook writers, generally confirm the view I have taken, although some views are to the contrary. In the *Handbook of the United Nations High Commission for Refugees* at page 34, there is the following discussion of Article 1E, relied upon by the Tribunal:

"This provision relates to persons who might otherwise qualify for refugee status and who have been received in a country where they have been granted ***most of the rights normally enjoyed by nationals****, but not formal citizenship.*

There is no precise definition of `rights and obligations' that would constitute a reason for exclusion under ...clause [Article 1E]. It may, however, be said that the exclusion operates if a person's status is ***largely assimilated to that of a national*** *of the country. In particular [s]he must, like a national, be* ***fully protected against deportation or expulsion****."* [Emphasis as added by the Tribunal]

There is nothing to support the construction given to the Article by the Handbook in this passage and, indeed, the historical material tends to deny it. In any event care should be taken. I may interpolate that care must be taken in using the United Nations Handbook as a guide to the correct interpretation of the Convention. As Lord Goff pointed out in *R v Secretary of State* [1988] 1 All ER 193 at 202, material in the Handbook can be seen by a court as being merely a *"statement of the point of view espoused by the High Commissioner"*. If the construction contended for in the Handbook is incorrect, it will not be adopted as that case shows. A similar view has been taken of the Handbook by the High Court. Thus Mason CJ in *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 spoke of the Handbook as:

"... more as a practical guide for the use of those who are required to determine whether or not a person is a refugee than as a document purporting to interpret the meaning of the relevant parts of the Convention."

Hathaway, after discussing the historical background, says of the Article (at 212-213):

*"... exclusion based on **de facto** nationality is truly an exceptional occurrence which implies the effective legal assimilation of the refugee to her host population. ...*

*Moreover, **de facto** nationality is qualitatively distinct from even long-term residence in a state, since it requires a consequential guarantee of rights to the refugee on terms at least as favourable as those which follow from Convention refugee status."*

Expressed again, if this is intended to be a test, it is not a test to be found in either the language or history of the Article. Of course it is true that a person who is granted *de facto* citizenship and has rights no less than those of a refugee under the Convention has no need for the grant of refugee status. But that is not to the point. Had the members of the United Nations intended to exclude from refugee status a person who has been granted by the state of residence rights no less than those of refugee status (albeit not all the rights of a national), they could have said so.

Dr Weis, at some time legal adviser in the Office of the United Nations High Commissioner for Refugees, in his work "The Concept of the Refugee in International Law" in the journal *Journal Du Droit International*, 1960, No 3 at 982 discusses the issue whether the same rights refers to civil rights only or civil rights as well as political rights. He concludes that the rights referred to are civil and not political rights. Of this issue he says:

"To include political rights would therefore be tantamount to applying the clause only to persons who have the nationality of the country of residence, but such persons are excluded by the definition itself as they are not `outside the country of (their) nationality'...".

With this I can agree, but nowhere does the learned author suggest that the clause should be construed so that only some of the civil rights or obligations of a national may be enjoyed by the person seeking refugee status before the Article operates. Robinson is generally supportive of the interpretation which I would adopt. The learned author says (at 65):

*"Section E refers to a special group of persons who are outside their country for reason of persecution but enjoy in the country of reception a status ordinarily not accorded to foreigners: they possess the rights and obligations which are attached to the possession of nationality, although they need not officially be naturalized. It suffices, if they are only **de facto** citizens of the country."*

Another work referred to by the Tribunal in support of its view is that of Guy S Goodwin-Gill, *The Refugee in International Law*, Clarendon Press, Oxford, 1990 ed, where (at 58) the learned author states that the convention and statutory provision did:

"... not require that the individuals in question should enjoy the full range of rights incidental to citizenship. Given the fundamental objective for protection, however, the right of entry to the state and freedom from removal are to be considered essential."

This passage is somewhat ambiguous. It is true, of course, that Article 1E is not concerned with the person to whom citizenship has been granted. Rather it is concerned with *de facto* rights rather than legal rights. That having been said, however, it is not correct that the rights, whatever those relevant rights may be, may be some only of the rights of a national or that the obligations be some only of the obligations of a national. The rights and obligations must be the same as those of a national but fall short of a grant of citizenship.

If a different view of the Article is adopted so that the Article refers to some but not all of the rights and some but not all of the obligations of nationals, then there is no criteria at all upon which to decide which of the relevant rights or obligations should be considered. One would be left at large. If, as the Tribunal itself seems to believe, some of the rights are important and some are not, then the fact that the Tribunal might decide that some rights are *"of particular importance"* and others are not, confers a discretion upon the person deciding whether or not refugee status may be applied, yet the Convention appears to apply an objective criterion not a subjective one.

There has been little in the way of judicial determination of the Article. In the *Polish Refugee Compensation Case (Case No 1X ZR 33/69)* reported in (1987) 72 International Law Reports 647 at 648-9, it is said:

"Article 1E of the Geneva Convention required that the person should be `recognized by the competent authorities' (considérée par les autorités compétentes). This phrase requires either a rule creating general rights and obligations for a group of foreigners or an individual decision by the competent authorities in favour of a particular alien. The enactment of a provision covering exceptions supports the view that persons are only excluded from recognition as refugees within the meaning of Article 1A of the Geneva Convention if ... they had acquired the essential rights and obligations of citizenship in their host country, pending naturalization or other similar proceedings ... and even though they were still citizens of another country or stateless. Such a status has been granted under Article 116(1) of the Basic Law (GG) to refugees or expellees of German stock, until they are able to acquire German nationality on the basis of a special law enacted in the Federal Republic of Germany. This interpretation is confirmed by the manner in which Article 1E of the Geneva Convention has been applied to date. This provision

was meant, as expressly stated in the Constitution of the International Refugee Organization, to exclude persons of German origin who enjoyed the rights and obligations of a German under Article 116(1) ... Article 1E has also been applied to refugees of Turkish extraction who emigrated from Bulgaria to Turkey and applied for naturalization in Turkey. They were granted the rights of a citizen of Turkish nationality up until their naturalization ...".

The passage cited certainly generally appears to support the interpretation I have suggested.

In *Hurt v Minister of Manpower and Immigration* (1978) 21 NR 525, the Canadian Federal Court of Appeal considered an argument that a person residing in West Germany and recognised in fact as having the rights and obligations possessed by a West German citizen, fell within Article 1E notwithstanding that the German Government wished to deport him. The Court said (at 529) that the evidence in the case negated rather than affirmed the allegation:

*"... that the appellant had any rights **similar** to those attached to West Germany nationality"*. [Emphasis added]

The comment was not relevant to the decision. In my view use of the word *"similar"* instead of the words *"the same"*, if intentional, misstates the language of the Article.

In summary, it is my view that Article 1E only operates to exclude a person from being considered a refugee where:

(a) there is a general law of the place of intermediate residence; or

(b) the competent authorities of that place apply a rule to a particular person; and

(c) in either case the consequence of the general or specific rule is that that person has the same rights and is under the same obligations as a national of the place of intermediate residence.

As presently advised, I do not think that the Article is rendered inapplicable merely because the person who has *de facto* national status does not have the political rights of a national. That is to say, the mere fact that the person claiming to be a refugee is not entitled to vote, does not mean that the person does not have *de facto* nationality. But short of matters of a political kind, it seems to me that the rights and obligations of which the Article speaks must mean all of those rights and obligations and not merely some of them.

Where the application of Article 1E comes before the Tribunal, two things are then necessary. First, it is necessary for the Tribunal to look at the general law of the intermediate place of residence to determine whether there is a general rule equating the applicant for refugee status with a national. Secondly, it is also necessary for the Tribunal to consider whether the competent authorities of the place in fact treat the particular national as having *de facto* nationality.

It seems, at least in the earlier case upon which the Tribunal placed its present finding, that the competent authorities in Germany were of the view that *de facto* nationality had not been conferred upon a refugee not being of Germany stock. This is clearly a relevant matter for the Tribunal to consider in the present case. Indeed, one would think that evidence from the Germany authorities that a person in the position of the applicant was not afforded *de facto* nationality would, if not always at least generally, be determinative of the issue.

In my view the Tribunal erred in applying the test which it did. Subject to the question of jurisdiction, the application should be remitted to the Tribunal to be heard again in accordance with law. I will stand the matter over until December 1996 with liberty to apply on seven days' notice so as to await the decision of a Full Court on the procedural question adverted to in the judgment.

I certify that this and the

preceding thirty (30) pages

are a true copy of the Reasons

for Judgment herein of his Honour

Justice Hill.

Associate:

Date: 21 August 1996

Applicant appeared in person.

Counsel and Solicitors J D Allanson instructed by the

for Respondent: Australian Government Solicitor

Date of Hearing: 26 June 1996

Date Judgment Delivered: 21 August 1996